FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 231

GEORGE VINCENT McMAHON,
Petitioner,

vs.

CITY OF DUBUQUE, IOWA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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George Vincent McMahon, your Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause on May 8, 1958.

OPINIONS BELOW.

The Findings of Fact, Conclusions of Law, and Judgment of the District Court (R. p. 28 to p. 46) has not been reported. A copy is appended as Appendix A.

The opinion of the Court of Appeals is reported in 255 Federal 2d 154. A copy is appended as Appendix B.

JURISDICTION.

The judgment of the Court of Appeals was entered May 8, 1958.

Jurisdiction to issue the writ rests on Title 28, United States Code Annotated, Section 1254.

QUESTIONS PRESENTED.

1. Has petitioner been denied due process of law, under the 14th Amendment to the United States Constitution, by refusal of Respondent, City of Dubuque, Iowa, to change the zoning classification of petitioner's property located on two northerly corners of an intersection from single family use to Class B business use, where property on the southerly corners of the same intersection is zoned for Class B business use, petitioner's property is better suited to business than residental use, such zoning change would not depreciate the value of any surrounding properties, there being no substantial residential interest to the north to be protected by refusing a uniform zoning classification of the four corners of the intersection, and petitioner, by reason of the refusal of the aforesaid rezoning, is faced with a substantial financial loss due to the taking of a part of his property in pending eminent domain proceedings?

2. Did respondent, City of Dubuque, Iowa, act arbitrarily, unreasonably and discriminatorily in three times in nine years refusing to change zoning classification of petitioner's property from single family residence use to

business use on grounds: (1) That a local business district should be limited to small shops, when its zoning ordinance permitted large enterprises in such districts, such as gasoline filling stations and super markets; (2) That some neighboring citizens object, but whose property values would not be adversely affected by such a change, their properties having been already depreciated by existing business on southerly corners of the intersection; 3) That traffic and parking problems would result from commercial use of petitioner's property, when such heavy existing traffic makes petitioner's property less desirable for residential than commercial use; (4) That southerly corners are used for business because they pre-existed the adoption of the zoning ordinance when said businesses on the southerly corners actually make petitioner's property most suitable for business use and least suitable for residential use, resulting in petitioner's property being undeveloped for either use?

CONSTITUTIONS AND STATUTES INVOLVED.

1. Constitution of the United States of America, Fourteenth Amendment, Section 1, which provides:

> "nor shall any State deprive any person of life, liberty or property without due process of law;"

2. Constitution of the State of Iowa, Article I, Section 9, which provides:

> "but no person shall be deprived of life, liberty, or property, without due process of law."

3. Federal Declaratory Judgment, 28 U.S.C.A., Section 2201.

4. Code of Iowa, 1954, Section 414.3, which provides:

"Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

"Such regulations shall be made with reasonable consideration, among other things, as to the character of the area of the district and the peculiar suitability of such area for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city or town."

5. City of Dubuque, Iowa, Zoning Ordinance No. 26-29, 3-34 as amended (R. pp. 65-81). See Appendix D.

STATEMENT OF THE CASE.

Federal jurisdiction was invoked in the first instance in the Courts below by virtue of diversity of citizenship, the petitioner being a resident of California and respondent being an Iowa Municipal Corporation, and the matter in controversy exceeding $3,000.00, exclusive of interest and costs, 28 U.S.C.A., § 1332. Jurisdiction is further predicated upon the Federal Declaratory Judgment Act, 28 U.S.C.A., § 2201.

This is an action to obtain declaratory judgment that the zoning of petitioner's property in the City of Dubuque, Iowa, for residential use was invalid, illegal and void, as a denial of due process of law, and that he has a right to use said property for such uses as are permitted under respondent's zoning ordinance in a local business district B.

In 1947, 1952 and 1956 petitioner requested the City of Dubuque, Iowa, to change the zoning classification of the property from a residential classification to a local business district B classification, and on each occasion this request was denied by respondent, the latest denial having occurred in January, 1956 (R. pp. 38-41, 57-65).

At the meeting of January 11, 1956, the Dubuque Planning and Zoning Commission repeated the reasons for denying petitioner's petition for rezoning:

"(1) Numerous letters from citizens against granting petition;

(2) Local Business Classification implies small shops for local area service. Super Oil and Super Service Grocery are not of local service nature;

(3) The development of such large commercial enterprises in this location would result in traffic and parking situations which would necessarily cause harm to this fine residential area;

(4) Local Business area as now provided is sufficient for immediate locality." (R. pp. 63, 64).

The uses permitted under Local Business District B are, *inter alia*, multiple dwellings, apartments and boarding houses, hotels, hospitals and sanitariums, garages, funeral homes, retail stores, service stations, theaters, dance halls, amusement parks, and personal service establishments (R. pp. 77, 80-81).

The State of Iowa, acting through the Iowa Highway Commission, made plans to relocate Highway 151 running through petitioner's property, and endeavored to negotiate purchase from the petitioner on the basis of the value of the property as zoned for residential purposes (R. pp. 4, 7, 39-41, 42). Petitioner subsequently sought a declara-

tory judgment adjudging that the zoning of petitioner's property is invalid, illegal, void and unconstitutional, as a denial of due process of law to petitioner in the use of his property; declaring that petitioner has a right to use his property for such uses permitted in local business district B; and praying for an injunction restraining the respondent from enforcing the residential classification against the petition (R. pp. 1-5). Condemnation proceedings were instituted in March, 1956, subsequent to the commencement of this action, and on May 1st the condemnation jury awarded $12,000 to petitioner who appealed from the award to the District Court of Iowa in and for Dubuque County, which appeal is awaiting trial.

The evidence presented by petitioner was undisputed and uncontradicted. Rockdale Road runs in a north-south direction and is intersected by Grandview Avenue, running in an east-west direction (R. pp. 51, 55). Petitioner's property is situated at the northeasterly and northwesterly corners of the intersection formed by these streets (R. pp. 13, 36, 51, 55). Rockdale Road carries Federal Highways 52, 61, 67 and 151 (R. pp. 21, 34), and a traffic count made by the Iowa State Highway Commission in 1956 showed an average of 6,990 vehicles a day on Rockdale Roard north of Grandview Avenue and 7,860 vehicles a day on Rockdale Road south of that Avenue (R. pp. 34-35, 81-82). Since 1934 traffic has substantially increased (R. p. 35).

Both of the parcels owned by the Petitioner are now and have always remained vacant and unimproved, except for billboards at the rear of the premises (R. pp. 36, 85, 89, 93).

In February, 1956, a combination grocery store and gasoline station was situated at the southwest corner of the intersection (R. pp. 12, 20, 36-37). South of this and

on the westerly side of Rockdale Road is a residence and south of that was the Comet Drive-In (R. pp. 12, 20, 37).

A combination restaurant, tavern and gasoline station was situated at the southeast corner of the intersection, and south of it on the easterly side of Rockdale Road was the State Highway Maintenance Garage (R. pp. 12-13, 20, 37). On a lot outside the garage were stored heavy road maintenance equipment, all of which were in plain view (R. p. 123). Scully Street was platted immediately south of the garage, and south of the street was another filling station (R. pp. 13, 20, 37).

To the west of petitioner's property at the northwest corner of the intersection was a vacant lot or two and then a private residence (R. pp. 13, 21). To the north of petitioner's property, and along the westerly edge of Rockdale Road, was a wooded area with a driveway extending some two or three hundred feet to a residence in a two family residence district (R. pp. 13, 21, 38, 53). To the north of this wooded area is a very precipitous drop of 100 to 150 feet to Southern Avenue (R. pp. 13, 21).

To the east of petitioner's property at the northeast corner of the intersection was a platted street and east of that was a residence (R. pp. 13, 21). To the north along Rockdale Road, was an entrance to a city park, the park being located to the northeast of petitioner's property (R. pp. 13-14, 21, 38).

The trial court, in its 13th Finding of Fact, found that according to one witness there was a value for both properties of $15,600 to $15,800 for residential purposes and a value for business purposes of $62,000 to $70,000 (R. p. 41). The testimony of petitioner's other witness was also uncontradicted, and he placed the residential value of both properties at $15,000 and the value for business purposes

at $57,000 (R. p. 21). The value of petitioner's property for commercial use is four times its value for residential use. Stated another way, the value for residence use is twenty-five per cent (25%) of its value for commercial use. Viewed by any standard, petitioner's loss is very substantial. Respondent presented no value witnesses, and petitioner's evidence stands uncontradicted that the rezoning of appellant's property from single family uses to Class B Local Business would not adversely affect the value of surrounding property because that property had already fully depreciated as a consequence of the businesses already existing on the two corners (R. pp. 14-15, 21-22).

Both the trial court and the United States Circuit Court of Appeals upheld the zoning of petitioner's property for residential use as a proper exercise of the zoning power of the City of Dubuque, Iowa.

REASONS FOR GRANTING WRIT OF CERTIORARI.

Petitioner claims that this case should be governed by the decision of the Supreme Court of the United States in *Nectow* v. *City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447 (1928). In that case the court invalidated a residential zoning of a piece of property not indispensable to general plan and adjacent to unrestricted property and without any necessity for inclusion therein by reason of health, safety, convenience and general welfare of the inhabitants of the city.

Petitioner's property, located on the northerly corner of an intersection, has great usability for business purpose and very little use for residential purpose. The suitability of four corners of an intersection for any particular use is determined largely by the actual use of the corners that are developed and used. This was the holding of

the Iowa Supreme Court in *Brackett* v. *City of Des Moines*, 246 Iowa 249, 67 N.W. 2d 542 (1955), wherein a factual situation obtained which is the reverse of the instant one. There a change in the zoning of corner lots from commercial to residential use was upheld as reasonable because there were residences established on three corners of an intersection originally intended as a shopping area. The court stated at pp. 259, 260, in the Iowa Reports and p. 547 in the North Western Reporter: "although the four corners at Fiftieth and Urbandale had been zoned commercial for more than a quarter of a century they were never used for that purpose. The plan of that zoning ordinance for the use of that intersection as a retail shopping district had not worked out. Instead it had developed into a residential district."

In the instant situation we have four corners fronting upon a main thoroughfare carrying four federal highways carrying an average of 7,000 to 7,860 vehicles a day. Two corners are zoned commercially and have been for many years, both supporting flourishing businesses. The other two corners, belonging to petitioner, are zoned for single family residential purposes and have been for many years, supporting only billboards.

Property lying south of petitioners is devoted to business use. Property lying to the east and west of petitioner's property is residential but, by undisputed testimony, none of this residential property or any other property surrounding or adjoining petitioner's property would be adversely affected in value by the use of petitioner's property for business purposes. Any depreciation in the values of the adjoining residential property has already been caused by the existing commercial uses of the southerly corner of the intersection. Such a fact was recognized in the case of *Taylor* v. *Village of Glencoe*, 372 Ill. 507, 25

N.E. 2d 62 (1940), where the court stated: "These encroachments have been present for many years and any damage that may be caused by an additional commercial or industrial use is negligible."

One factor that has been entirely overlooked by the courts below is that there is no residential district or interest north of petitioner's property to justify the refusal to zone petitioner's property for business use. The property line to the north of petitioner's property is a highway carved out like a ledge on the side of a steep bluff which is a very rocky and wooded area. On the east side of the highway north of Petitioner's property is a driveway into a city park located further to the east, said driveway being through a wooded area (see photograph Exhibits 18 and 19, pp. 109 and 113), the entrance to the park being the drive away from the highway on the left side of the photograph (R. p. 113). On the west side of the highway the property lying north of petitioner's property is zoned as a two-family residence area and has one house a considerable distance back from the highway, overlooking the edge of a steep cliff. In further support of petitioner's contention that there is no interest to the north of this property which requires protection from a business use, see Photographs Exhibits 19 and 20 showing the descent of the highway around a rocky and wooded bluff (R. pp. 113 and 117). Both the trial court and the Circuit Court of Appeals were in error in stating that the residential district lying to the north of petitioner's property required protection against the use of petitioner's property for business purposes. It is submitted that the rocky bluff did not require such protection and the natural barrier between petitioner's property and other usable property to the north was the bluff itself rather than Grandview Avenue.

Therefore, as in the case of *Nectow* v. *City of Cambridge, supra,* the inclusion of petitioner's property in the residential district is not indispensable to the general zoning plan of Dubuque and there is no necessity for its inclusion in the residential area for reasons of health, safety, convenience or general welfare. In fact, there is no reasonable basis for differentiation of petitioner's property from property located on the southerly corner of the same intersection. The failure of respondent to rezone petitioner's property for Class B business use is, therefore, a denial of due process of law, in violation of the 14th Amendment of the United States Constitution.

The refusal to rezone petitioner's property for business use was arbitrary, discriminatory and unreasonable. In refusing to rezone the City of Dubuque acted on the recommendations of its Planning and Zoning Commission. It is submitted that the reasons advanced by that Commission were arbitrary, unreasonable and discriminatory.

The first reason assigned by the Zoning Commission for refusal to rezone petitioner's property was that local business districts should be limited to small shops and not to large enterprises such as a gasoline station or supermarket (R. pp. 40, 63). This position is in direct conflict with the uses permitted under the Dubuque Zoning Ordinance which allows gasoline stations, retail stores, supermarkets, drive-in restaurants, motion picture theaters, trailer and auto sales lots, funeral homes, taverns, garages and office buildings as uses in Local Business District B (R. pp. 77, 80-81). The Commission clearly indicated in both the second and fourth reasons enumerated by them that they were in open conflict with the ordinance itself and were limiting the uses to businesses "sufficient for immediate locality." (R. pp. 40, 63-64). There is absolutely nothing in the ordinance either directly or impliedly re-

stricting the uses to those which are sufficient to satisfy the needs of the inhabitants in the immediate area. Patently, this is a deliberate, unconscionable and obvious perversion of the zoning ordinances, and even on its face is baldly arbitrary, unreasonable and discriminatory.

Second, the Commission stated as a *reason* for refusing to rezone the petitioner's two corner lots "numerous letters from citizens against granting petition." (R. pp. 40, 63). The fears of these objectors were without reason because under the undisputed evidence in this case the values of their property would not be adversely affected by granting the petitioner's request to use his two corners for business use. Petitioner's property has remained undeveloped during the entire life of the City of Dubuque Zoning Ordinance adopted in 1934, although property to the east and west of it has been developed. Petitioner's property has a value for commercial use which is four times its value for residential use. To deny a rezoning request because people object without any foundation in fact for their objections makes the action of the Commission arbitrary and unreasonable.

Third, the Commission further adopted as a reason the asserted fact that traffic and parking problems would result from the commercial use of petitioner's corner properties (R. pp. 40, 63). In using this reason the Commission entirely overlooked the salient fact that the very existence of the heavy traffic on the highway bisecting petitioner's property made his property unsuitable for residential use. Such effect of traffic was recognized in the case of *Tews* v. *Woolhiser*, 352 Ill. 212, 185 N.E. 827, wherein it was stated: "Congested traffic conditions, however, scarcely constitute an argument in support of the limitation of Block A to residence use, since such conditions rather argue its unfitness for such use." Indeed, on

the basis of uncontradicted evidence the court made its 7th Finding of Fact describing Rockdale Road as "one of the main thoroughfares in the southerly part of the City" (R. p. 34) and acknowledged that it constitutes Federal Highway 52, 61, 67 and 151 (R. p. 34). Morever, the same findings take cognizance of the heavy traffic at the intersection in point: "In the year 1956 the Iowa State Highway Commission conducted a count as to the traffic on Rockdale Road north and south of its intersection with Grandview Avenue. That count showed an average of 6,990 vehicles a day on Rockdale Road north of Grandview Avenue and 7,860 vehicles a day on Rockdale Road south of that Avenue." (R. pp. 34-35). The trial court went on to observe that "In view of the growth in the population of the City and the increase in the number of motor vehicles in use, it can be, and it is, assumed that since 1934 there has been a substantial increase in the traffic on Rockdale Road." (R. p. 35). The unreasonable and arbitrary character of the decision of respondent not to rezone becomes clear from the fact that it used as a reason for denying it a factor which in truth was a cogent reason for the granting of the request.

The fourth reason assigned by the Commission for refusing to rezone petitioner's property was that the business use of the two southerly corners of the same intersection pre-existed the adoption of the Zoning Ordinance but the Commission refused to give any consideration to the very clearly recognizable fact that the suitable use of petitioner's property is largely determined by the use made of the property on the southerly corners. This is especially true in this case because there was no residential interest north of petitioner's property requiring any protection from a business use of petitioner's property and the fact that the property lying to the east and west would not be depreci-

ated in value by a commercial use of petitioner's property. Thus, every reason assigned by the Commission for refusal to rezone on examination is shown to be unreasonable, arbitrary and discriminatory to the extent that the issue is not even debatable.

Another reason for the granting of the Writ of Certiorari is that unless the Writ is granted petitioner will suffer an irreparable property loss without due process of law. Recognizing that the difference in economic value as determined by different zoning classifications is not, in itself, a sufficient reason to condemn a zoning regulation *per se*, it is a very compelling reason when combined with the grounds of greater suitability, no loss of value to adjoining property, no harm to the general zoning plan, and the fact that the two other corners of the intersection are already used for business, thus making petitioner's property undesirable for residential use.

Various "corner" cases similar to the instant situation in which the municipalities' insistence on maintaining the existing residential classification on one or more corners was held unconstitutional. In *Taylor* v. *Village of Glencoe*, *supra*, two corners of an intersection were zoned commercially, and two were residentially zoned. One of these latter two corners was vacant and the other was owned by plaintiff. The court held the ordinance to be unconstitutional as applied to plaintiff's property. In *Forbes* v. *Hubbard*, 348 Ill. 166, 180 N.E. 767 (1932), three corners of a busy intersection were zoned for commercial purposes and the fourth corner, owned by that plaintiff, was zoned for single family residences. The Court had no difficulty in finding the ordinance to be unreasonable and confiscatory as it related to plaintiff's property. A similar factual situation obtained in *City of Pleasant Ridge* v. *Cooper et al.*,

267 Mich. 603, 255 N.W. 371 (1934), and the Court held the ordinance unconstitutional.

Petitioner is faced with an immediate loss because all of his property on one intersection and part of his property on the other intersection has been taken in eminent domain proceedings which are still pending for final determination of damages. Petitioner should not be compelled to accept a valuation for his property based upon a residential use under the facts in this case. Petitioner's action for declaratory judgment was the only method by which petitioner could obtain relief from the taking of his property without due process of law. He has attempted three different times in the last nine years to get the City of Dubuque to rezone his property as it should be zoned in accord with sound zoning principles and in order to give him his constitutional rights under the 14th Amendment.

CONCLUSION.

In zoning matters the courts are tempted to indulge in the presumptive validity of the municipal regulation as an exercise of the State's police power, and it is much more difficult to come to grips with the factual realities of such regulation as applied to any particular parcel of property. The factual realities pertaining to the cause of this petitioner demonstrate, beyond the peradventure of doubt, that this petitioner will suffer an unconstitutional taking of his property without due process of law unless the Supreme Court of the United States grants him relief. Petitioner requests the Supreme Court of the United States, in passing on this petition for writ of certiorari, to actually look at the photographs which are part of the printed Record submitted with this petition. Petitioner is trusting that when the Court comes to a full and complete understanding of

the factual realities of this case, the Court will grant him a writ of certiorari.

Respectfully submitted,

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APPENDIX A.

Findings of Fact, Conclusions of Law, and Order for Judgment.

(Filed in U. S. District Court on May 18, 1957.)

The above-entitled case came on for trial before the Court at the Federal Court House at Dubuque, Iowa, on May 3rd, 1957. E. Marshall Thomas appeared as attorney for the plaintiff. Thomas H. Nelson appeared as attorney for the defendant. On that date the parties presented their evidence; arguments of counsel were made, and the case submitted to the Court and by it taken under advisement. Now, to-wit, on this 18th day of May, 1957, the Court, now being fully advised in the premises, makes and enters the following Findings of Fact, Conclusions of Law, and Order for Judgment.

Findings of Fact.

1. The plaintiff is a citizen of the State of California. The defendant is a municipal corporation duly organized and existing under and by virtue of the laws of the State of Iowa. The complaint was filed herein on February 17th, 1957. The plaintiff at the time of the filing of it was the owner of parcels of land in the City of Dubuque referred to as Lot 2 of Lot 2 of Lot 5 of Mineral Lot 21 and Lot 2 of Lot 2 of Lot 2 of Lot 5 of Mineral Lot 21. The two parcels together are also described as Lot 2 of Lot 2 of Lot 5 of Mineral Lot 21.

The plaintiff brought this action under the provisions of Section 2201, Title 28, United States Code. That Section relates to declaratory judgments. In his complaint

he stated that in 1934 the City of Dubuque by ordinance zoned the said parcels for residential use. He prayed for the following relief:

"(a) That the Court enter a declaratory judgment adjudging that the zoning of plaintiff's property described in Paragraph 5 of plaintiff's complaint for residential use is invalid, illegal, void and unconstitutional, as a denial of due process of law to plaintiff in the use of his property, and,

"(b) Declaring that the plaintiff has a right to use said property for such uses as are permitted under the City of Dubuque Zoning Ordinance in a 'Local Business District', and

"(c) That upon such adjudication the Court issue an injunction restraining the defendant from enforcing against the plaintiff City of Dubuque Zoning Ordinance 3-34, which zones plaintiff's property for residential use."

2. The defendant City of Dubuque, Iowa, is classified under the laws of the State of Iowa as a city of the first class. It operates under what is designated by the laws of Iowa as the City Council form of government. The United States Census figures, of which the courts take judicial notice, are as follows as to its population: 1920 population 39,141, 1930 population 41,679, 1940 population 43,892, 1950 population 49,671.

3. Chapter 414, Code of Iowa 1954, relates to the matter of zoning by Iowa municipal corporations. Sections 414.1, 414.2, 414.3 and 414.4 of that Chapter provide as follows:

"414.1 Building restrictions—powers granted. For the purpose of promoting the health, safety, morals, or the general welfare of the community, any city or town is hereby empowered to regulate and restrict the height,

number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

"414.2 Districts. For any or all of said purposes the local legislative body, hereinafter referred to as the council, may divide the city or town into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this chapter; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations and restrictions shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

"414.3 Basis of regulations. Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

"Such regulations shall be made with reasonable consideration, among other things, to the character of the area of the district and the peculiar suitability of such area for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city or town.

"414.4 Regulations and boundaries. The council of such city or town shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established,

and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days notice of the time and place of such hearing shall be published in a paper of general circulation in such city or town."

Section 414.5 of that Chapter provides in part as follows:

"Such regulations, restrictions, and boundaries may, from time to time, be amended, supplemented, changed, modified or repealed."

Section 414.6 of that Chapter provides as follows:

"414.6. Zoning commission. In order to avail itself of the powers conferred by this chapter, the council shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts, and appropriate regulations and restrictions to be enforced therein. Where a city plan commission already exists, it may be appointed as the zoning commission. Such commission shall, with due diligence, prepare a preliminary report and hold public hearings thereon before submitting its final report; and such council shall not hold its public hearings or take action until it has received the final report of such commission. After the adoption of such regulations, restrictions, and boundaries of districts, the zoning commission may, from time to time, recommend to the council amendments, supplements, changes, or modifications."

Sections 414.7 through 414.19 of that Chapter relate to matters having to do with a Board of Adjustment, including court review of its decisions.

4. On March 29th, 1929, the City Council of Dubuque enacted Ordinance No. 26-29 providing a City Planning and Zoning Commission and defining its Powers and Duties.

Section 1 of that Ordinance provides as follows:

"That there be and there is hereby created a city planning and zoning commission, the members of which shall consist of seven citizens of the City of Dubuque who shall be qualified by knowledge and experience to act in matters pertaining to the development of city planning and zoning, none of whom shall hold any elective position in said City. Such members shall be appointed by the City Council."

Section 5 of that Ordinance provides in part as follows:

"Said commission shall have and possess the following powers, * * *:

"1. To make such surveys, studies, maps, plans or plats of the whole or any portion of the City and of any land outside thereof, which in the opinion of such commission bears relation to a comprehensive plan, and shall submit such plan to the Council with its studies and recommendations and it may publish the same.

"5. To carry on comprehensive studies of present conditions and the future growth of such City in order to guide and accomplish a co-ordinated, adjusted and harmonious development of such City in accordance with the present and future needs thereof to the end that the health, safety, morals, order, convenience, prosperity and general welfare may be best promoted.

"7. To prepare a comprehensive plan regarding the height, number of stories and size of buildings and other structures; the percentage of ground that may be occupied; the size of yards, courts and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes and to this end shall prepare a preliminary report and hold public hearings thereon and after such hearings have been held, to submit its final report and recommendations to the City Council.

"8. To recommend to the City Council, from time to time, as conditions require, amendments, supplements, changes or modifications in the comprehensive plan prepared by it."

5. On January 29th, 1934, the City Council adopted Ordinance No. 3-34. The preamble to it is as follows:

"Whereas, the City Council of the City of Dubuque Deems It Necessary to Provide for the Zoning or Districting of Said City in Order to Lessen Congestion in the Streets; to Secure Greater Safety and Protection from Fire, Panic and Other Dangers; to Promote the Public Health, Morals and General Welfare; to Provide Adequate Light and Air; to Prevent the Overcrowding of Land; to Avoid Undue Concentration of Population; to Facilitate the Adequate Provisions of Transportation, Water, Sewage, Schools, Parks and other Public Requirements; to Conserve the Value of Lands and Buildings and Encourage the Most Appropriate Use of Land Throughout the City in Accordance with a Comprehensive Plan;"

Article I of that Ordinance provides as follows:

"Classification of Districts. Section 1. This ordinance shall be known as 'The Zoning Ordinance of the City of Dubuque' and said City is hereby divided into seven classes of districts, to-wit:

a. Single family residence districts.

b. Two family residence districts.

c. Multiple residence districts.

d. Local business districts.

e. Business districts.

f. Light industrial districts.

g. Heavy industrial districts.

"Boundaries of Districts. Section 2. The boundaries of said districts are shown on a map entitled 'Zoning Plan, City of Dubuque, Iowa,' dated Jan. 29, 1934, which map is hereto attached and made a part hereof and all notations, references and information shown thereon shall be as much a part of this ordinance as if the same were fully incorporated herein."

6. The City of Dubuque is situated on the Mississippi River. The main business part of the City extends north and south along the River. The larger places of business and the industrial plants are in the main situated in that part of the City. That part of the City is surrounded by a range of hills. Over the years the residential area of the City has extended over and beyond the range of hills. The topography of the City is such that a substantial part of the traffic in and out of the City is funnelled into a few main thoroughfares.

7. Rockdale Road is one of the main thoroughfares in the southerly part of the City. It commences near the southern end of the main business part of the City. It then proceeds in a southerly and westerly direction through a large area zoned for residence purposes to the City limits. The map which is a part of the Zoning Ordinance indicates that the distance between the point Rockdale Road leaves the main business part of the City and the point where it leaves the City limits is about a mile and a half. That same map indicates that about half way between these two points Rockdale Road intersects a residential street designated Grandview Avenue. Grandview Avenue commences approximately two miles north and west of the intersection. It then proceeds in a general southerly direction through an area zoned for residence purposes to the intersection. It then proceeds across and beyond the intersection in an easterly direction through an area zoned

for residential purposes. Rockdale Road as it proceeds to the City limits constitutes Federal Highways Numbers 52, 61, 67 and 151. In the year 1956 the Iowa State Highway Commission conducted a count as to the traffic on Rockdale Road north and south of its intersection with Grandview Avenue. That count showed an average of 6,990 vehicles a day on Rockdale Road north of Grandview Avenue and 7,860 vehicles a day on Rockdale Road south of that Avenue. The amount of traffic on Rockdale Road in 1934 at its intersection with Grandview Avenue does not appear. In view of the growth in the population of the City and the increase in the number of motor vehicles in use, it can be, and it is, assumed that since 1934 there has been a substantial increase in the traffic on Rockdale Road. Up to the time of the commencement of this action the travelled portion of Rockdale Road north and south of its intersection with Grandview Avenue consisted of a concrete slab. The photographs in evidence indicate that the slab was around 20 feet wide.

8. In 1934 at the time of the adoption of the Zoning Ordinance there was an area immediately to the south and west of the intersection of Rockdale Road and Grandview Avenue which was being used for business purposes. That area was approximately 100 feet in width, east and west, and approximately 300 feet in length, north and south. At the same time there was an area immediately to the south and east of the intersection approximately 400 feet in length, north and south, which was being used for business and non-residential purposes. For the greater part that area was approximately 400 feet in width, east and west. However, at the northeast corner of that area there was a small projection to the east and at the southwest corner of it there was a small projection to the south. In the Zoning Ordinance the City Council zoned these two areas as a

Local Business District. It is apparent that the City Council in zoning the two areas for Local Business District uses zoned these areas as they found them at the time.

The Zoning Ordinance as adopted in 1934 contained the classification "Local Business District". Subsequently the City Council amended the Ordinance to provide for a "Local Business District A" and a "Local Business District B" classification. The principal difference between the two Districts is that in a Local Business District B driveins, taverns and oil and gas stations were permitted. Use for such purposes was not permitted in a Local Business District A. The territory referred to lying south of the intersection of Rockdale Road and Grandview Avenue which had been classified as a "Local Business District" in the original Ordinance was in the Ordinance as amended classified as "Local Business District B". That classification was substantially in accord with the situation as it existed at the time of the adoption of the original Ordinance and as it existed at the time of the amendment of the Ordinance and as it existed at the time of the commencement of this action.

9. The property owned by the plaintiff consists of two vacant tracts of land. One tract is located on the northeast corner of the intersection of Rockdale Road and Grandview Avenue. The other tract is located on the northwest corner of the same intersection. The tract on the northeast corner of the intersection has a frontage of 227 feet on Grandview Avenue. The tract on the northwest corner of the intersection has a frontage of 134 feet on Grandview Avenue. Both tracts extend approximately 200 feet to the north from that Avenue. The tract on the northeast corner of the intersection is bounded on the west by Rockdale Road and on the east by an unopened street designated as Rowan Street. The tract on the northwest corner of

the intersection is bounded on the east by Rockdale Road. There was no change in physical state and condition of the two tracts between 1934 and the time this action was commenced. The 1934 Zoning Ordinance zoned the tract located at the northeast corner of the intersection for single family residence use. That same Ordinance similarly zoned the area to the north and east of that tract. That same Ordinance zoned the south hundred feet of the tract located on the northwest corner of the intersection for single family residence use, and zoned the north 107 feet of it for two-family residence use. That same Ordinance zoned the area to the north and west of that tract for two-family residence use.

10. At the time of the adoption of the Zoning Ordinance in 1934 the area approximately 100 feet in width and 300 feet in length south and east of the intersection was, as heretofore noted, in use for business purposes. At the north end of the strip there was a grocery store and filling station. South of the grocery store and filling station there was a residence. South of the residence was a filling station. The only change in the situation in that strip between 1934 and the time this action was commenced was that the filling station had been replaced by a drive-in at which sandwiches, ice cream, milk shakes and similar items were sold.

At the time of the adoption of the Zoning Ordinance in 1934 the area lying south and west of the intersection was, as heretofore noted, in use for business and non-residential purposes. At that time at the north end of the strip there was a combination tavern, restaurant and filling station with some cabins used for motel purposes adjoining. To the south of that tavern, restaurant and filling station there was a State Highway Commission garage. Immediately to the south of that garage was a street designated as Scully

Street. Immediately across that Street to the south was a filling station. The only change in the situation in that area from 1934 and up to 1956 was that the cabins used for motel purposes in 1934 had been removed and an addition had been built on to the Highway Garage.

The 1934 Zoning Ordinance which zoned the areas referred to as a Local Business District zoned a vast area in this part of the City for residential use either, one family, two family or multiple family. For long distances to the north, south, east and west of that Local Business District the territory was zoned for such residential uses. It is still so zoned. So far as the record shows the only change made in the 1934 Zoning Ordinance as to that Business District or in the general area was a change which permitted the State Highway Commission to build an addition to its garage.

Immediately to the south of the two areas referred to there were two strips which in the 1934 Zoning Ordinance were zoned for multiple family residences. It appears that there is now a motel in each of these strips. Such use is apparently permissible in an area zoned for multiple housing.

11. To the north of the lot owned by the plaintiff on the northeast corner of the intersection there is located a driveway leading into a City park known as Grandview Park. That Park is one of substantial area. It lays to north and east of plaintiff's lot just referred to. To the east of that lot is a well built up residence district.

To the north of the lot owned by the plaintiff on the northwest corner of the intersection is a wooded area on which is situated a single family residence. The topography of some of the area north and west of this lot is such that it cannot be used for building purposes. As

Grandview Avenue proceeds north and west beyond the area referred to it traverses an extensive area zoned either for single family or two family use.

12. The time when the plaintiff became the owner of the two lots in question does not appear. The minutes of a meeting of the Planning and Zoning Commission held on July 18th, 1947, are in part as follows:

> "The petition of George McMahon et al., requesting rezoning of their property on the northwest corner of Grandview Ave. and the Rockdale Road received first consideration. On motion of Mr. Stoffregen, seconded by Mr. Bissell and carried [unamiously], the Planning & Zoning Commission recommended to City Council denial of the petition in its present form as it was indefinite, vague, failing to state classification desired or indicate contemplated land use so that the Commission might understand what was desired."

On August 29th, 1952, a petition was filed by Mabel L. Hetland, Ludwig Hetland, the plaintiff and others directed to the City Council. In that petition the petitioners stated that they were the owners of the two lots in question. They requested that the zone classification of them be changed from residential to local business. They stated they wished to use the lots for a supermarket and a filling station. The petition was referred to the Planning and Zoning Commission. The minutes of a meeting of that Commission held on October 22, 1952, are in part as follows:

> "The meeting was called for a hearing on petition of Mabel L. Hetland et al., regarding the rezoning of certain lots on the intersection of Grandview Ave. and the Rockdale Road, referred to the Planning & Zoning Commission by City Council. Attorney Robert Kintzinger appeared in favor of the rezoning in the interest of the Hetlands.

"The Secretary read the original petition and counter petitions, then Mr. Kintzinger covered the situation at length.

"The following objectors then appeared,

Parker Higley, 2000 South Grandview Ave.
Mrs. Charles Schueller, 1370 South Grandview Ave.
Dr. Kaep, Rockdale Road.
Charles Spahn, 1400 South Grandview Ave.
Perry Mellon, 1465 South Grandview Ave.
Margaret Conners, 1610 South Grandview Ave.

"After the public hearing the Planning & Zoning Commission went into executive session for a complete review.

"Moved by Mr. Schiltz, seconded by Mr. Oeth and carried unanimously that the Planning & Zoning Commission recommend to City Council denial of the petition for the reasons 1st that a Local Business District as the name implies is for small shops to serve the local neighborhood and that a Super Service Gasoline Station and a Super Service Grocery as projected are not of a local nature, 2nd the development of such large commercial enterprises in this location would result in a very serious traffic and parking situation which would necessarily cause harm to this fine residential area."

The recommendation of the Planning and Zoning Commission was adopted by the City Council.

Sometime prior to January 4th, 1956, the plaintiff filed a petition with the City Council. He stated that he was the sole owner of the property in question. He requested that the property be zoned for local business use. On January 4th, 1956, the City Council referred that petition to the Planning and Zoning Commission. The minutes of a meeting of that Commission held on January 11th, 1956, are in part as follows:

"Next the petition of George Vincent McMahon referred to Dubuque Planning & Zoning Commission by City Council Jan. 4, 1956, was considered. This is the third application for rezoning of the N. E. & N. W. corners of Grandview Ave. and Highway 161 since 1947. The first application (1947) by Geo. McMahon was referred back to applicant for more information, and nothing further heard of it, until Oct. 22, 1952, when Mabel Hetland represented by Attorney Robert Kintzinger made second appeal so that property might allegedly be sold for the site of a Super Oil and Super Service operator.

"The Planning & Zoning Commissioner recommended to City Council denial of Mabel Hetland's petition for the following reasons:

(1) Numerous letters from citizens against granting petition;

(2) Local Business Classification implies small shops for local area service. Super Oil and Super Service Grocery are not of local service nature.

(3) The development of such large commercial enterprises in this location would result in Traffic and parking situations which would necessarily cause harm to this fine residential area.

(4) Local Business area as now provided is sufficient for immediate locality.

"City Council sustained the Planning & Zoning Commission in its views.

"It is a fact that the S. E. & S. W. corners are now Local Business—made so because existing when Zoning Ordinance first went into effect. However, it has been considered against good zoning regulations to allow this area to enlarge to the north.

"Moved by Mr. Glab, seconded by Mr. Riley and unanimously carried that the petition of George Vin-

cent McMahon by his Attorney E. Marshall Thomas be denied."

The recommendation of the Planning and Zoning Commission was adopted by the Council. This action followed.

13. One witness called by the plaintiff testified that the two lots in question would be suitable for use as drive-ins and service stations and that motels would be a proper use of them. That same witness testified that in February, 1956, the market value of plaintiff's lot on the northeast corner of the intersection as then zoned was from $9,100.00 to $9,200.00. He further testified that if that lot was zoned so as to permit Local Business District B uses its market value would be from $37,000.00 to $40,000.00. That same witness testified that in February, 1956, the market value of plaintiff's lot on the northwest corner of the intersection as then zoned was from $6,500.00 to $6,600.00. He further testified if that lot was zoned so as to permit Local Business District B uses its market value was from $25,000.00 to $30,000.00.

Another witness called by the plaintiff testified that the two lots in question would be suitable for motels, drive-ins or service stations. He testified that in February, 1956, the market value of plaintiff's lot in the northeast corner of the intersection as then zoned was $8,000.00. He further testified that if that lot was zoned so to permit Local Business District B uses its market value would be $31,000.00. That evidence was not contradicted by the defendant. It clearly appears that if the plaintiff's lots at the time of the commencement of this action could have been used for Local Business District "B" uses they would have had a very much greater market value than they had as then zoned.

14. Early in 1956 the Iowa State Highway Commission undertook the project of widening Rockdale Road for highway purposes. Proceedings to condemn the greater part of plaintiff's property for that purpose were commenced in March, 1956, subsequent to the commencement of this action. In that proceedings the Iowa State Highway Commission condemned all of plaintiff's lot on the northeast corner of the intersection and a strip along the easterly edge of plaintiff's lot on the northwest corner of the intersection. This strip is 20 feet in width at the southerly end of that lot and 30 feet in width at the northerly end of that lot. On May 1st, 1956, the condemnation jury made an award of $12,000.00 for the land condemned. The Highway Commission on or about May 14th, 1956, deposited the amount of the award with the County Treasurer of Dubuque County. The plaintiff made an appeal from that award, and that appeal is awaiting trial in the District Court of Iowa in and for Dubuque County.

15. In 1929, as heretofore noted, the City Council provided for a Planning and Zoning Commission. That Commission, among other things, was directed to make comprehensive studies of the present conditions and future growth of the City in the interests of health, safety and a co-ordinated adjustment and harmonious development of the City. That Commission was also directed to prepare a comprehensive zoning plan for the City. In 1934 the City Council adopted a comprehensive zoning plan for the City. At the time the Council adopted that Ordinance the two strips, heretofore referred to, were in use for businesses generally regarded as local in character. Those two strips together were approximately a block and a half in area. They were situated deep in the heart of an area deemed by the City Council to be desirable for residential use. The City Council, as heretofore noted, zoned that block and a

half area as a Local Business District in accord with the use then being made of it. It strictly restricted the limits of that District to that block and a half area. The only changes in that block and a half area between 1934 and the commencement of this action were an increase in the traffic on Rockdale Road, the removal of the motel cabins from the north end of the east strip, the addition to the Highway Commission garage, and the converting of a filling station to a drive-in.

16. The Planning and Zoning Commission has consistently refused to recommend any extension of that block and a half area for business purposes and the City Council has consistently refused to allow such expansion. The Planning and Zoning Commission and the City Council have not permitted any intrusions for business or industrial purposes into the area zoned for residential purposes in this part of the City. That Commission and the City Council have regarded Grandview Avenue as a natural break on the north against encroachment of business places into an area zoned for residential purposes. The Planning and Zoning Commission has manifested special concern as to the traffic problem at the intersection of Rockdale Road and Grandview Avenue. It is apparent that the Planning and Zoning Commission and the City Council are desirous of preventing the start of what could result in a gradual erosion of a desirable residential area. There is no claim made that the members of the Planning and Zoning Commission and the City Council in refusing to extend the Local Business District in question north of Grandview Avenue have been motivated by ill will or other improper motives. It is apparent that neither that Commission nor the City Council has showed any favoritism in the matter of preventing business intrusion into this residential area of the City, either generally or particularly.

Under the applicable State Law it was the duty of the Planning and Zoning Commission and the City Council to view any requests for changes in the light of the over-all objectives set forth in Sections 414.1 and 414.3, Code of Iowa 1954, and in the preamble to the Ordinance in question. The action of the Planning and Zoning Commission and the City Council in refusing to extend the Local Business District in question to include the plaintiff's lots is in accord with those objectives. The City Council in refusing to zone plaintiff's property as requested did not act arbitrarily, discriminatorily, unreasonably or capriciously. Such refusal was proper and legal under the police power granted to the City Council by the State of Iowa and did not constitute a denial to the plaintiff of due process of law.

17. At the time of the commencement of this action a justiciable controversy existed between the plaintiff and the defendant.

CONCLUSIONS OF LAW.

1. That this Court has jurisdiction of the subject matter of the action and the parties thereto.

2. That the City Council is the proper agency to pass upon requests for rezoning such as made by the plaintiff.

3. That on February 17th, 1956, the property owned by the plaintiff and described as Lot 2 of Lot 2 of Lot 5 of Mineral Lot No. 21, in the City of Dubuque, Iowa, was subject to the terms and provisions of Ordinance No. 3-34 adopted January 29th, 1934.

4. That under the terms and provisions of said Ordinance the said property was zoned for residence use.

5. That such zoning was proper and legal on January 29th, 1934, and at all times thereafter up to and including February 17th, 1956.

6. That the refusal of the defendant to rezone the said property so that it might be used for uses permitted in Districts zoned as Local Business Districts in said Ordinance was proper and legal.

ORDER FOR JUDGMENT.

It Is Hereby Ordered that judgment shall be entered adjudging, decreeing and declaring the rights of the parties in accord with the foregoing and rendering judgment against the plaintiff for costs.

Henry N. Graven,
United States District Judge.

Judgment.

(Filed in U. S. District Court on May 18, 1957.)

The above-entitled case came on for trial before the Court at the Federal Court House at Dubuque, Iowa, on May 3rd, 1957. E. Marshall Thomas appeared as attorney for the plaintiff. Thomas H. Nelson appeared as attorney for the defendant. On that date the parties presented their evidence, arguments of counsel were made, and the case submitted to the Court and by it taken under advisement. On the 18th day of May, 1957, the Court made and entered herein its Findings of Fact, Conclusions of Law, and Order for Judgment. Now, therefore, in accord with the said Findings, Conclusions and Order:

It Is Hereby Adjudged, Decreed and Declared as follows:

1. That on February 17th, 1956, the property owned by the plaintiff and described as Lot Two (2) of Lot Two (2) of Lot Five (5) of Mineral Lot Twenty-one (21) in the City of Dubuque, Iowa, was subject to the terms and provisions of Ordinance No. 3-34, adopted January 29th, 1934.

2. That under the terms and provisions of said Ordinance the said property was zoned for residence use.

3. That such zoning was proper and legal on January 29th, 1934, and at all times thereafter up to and including February 17th, 1956

4. That the refusal of the defendant to rezone the said property so that it might be used for uses permitted in Districts zoned as Local Business Districts in said Ordinance was proper and legal.

5. That on February 17th, 1956, the said property was subject to a valid zoning ordinance restricting its use to single family and two-family residence use.

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered against the plaintiff for the taxable costs of this action taxed in the sum of $ .....

Signed in the Northern District of Iowa this 18th day of May, 1957, for entry in the Eastern Division.

Henry N. Graven,
United States District Judge.

APPENDIX B.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT.

George Vincent McMAHON, Appellant,

v.

CITY OF DUBUQUE, IOWA, Appellee.

No. 15868.

May 8, 1958.

E. Marshall Thomas, Dubuque, Iowa (O'Connor, Thomas, McDermott & Wright, Dubuque, Iowa, on the brief), for appellant.

T. H. Nelson, Dubuque, Iowa, for appellee.

Before SANBORN, WOODROUGH and VOGEL, Circuit Judges.

WOODROUGH, Circuit Judge.

George Vincent McMahon brought this action to obtain declaratory judgment that the zoning of certain described property belonging to him in the City of Dubuque, Iowa, for residential use was invalid, illegal and void as a denial of due process of law in the use of said property and declaring that he has a right to use said property for such uses as are permitted under the City Zoning Ordinance in a Local Business District and for injunction against enforcement of the Ordinance which zones the property for residential use. Federal jurisdiction resulted from diversity and the amount involved. The District Court made painstaking and elaborate findings and held that the zon-

ing of appellant's property for residential use was proper and legal and the refusal to rezone it so that it might be used for Local Business was also proper and legal. This appeal is taken from the judgment dismissing the action. The findings and conclusions of the Court have not been reported.

The material facts were not in dispute and may be summarized from the findings of the trial court as follows:

On March 29, 1929, the City Council of Dubuque enacted Ordinance No. 26-29, providing for a City Planning and Zoning Commission to: make surveys, studies, maps, plans or plats of the whole or any portion of the City and any land outside thereof; to carry on comprehensive studies of present conditions and future growth of the City in order to guide and accomplish a co-ordinated, adjusted and harmonious development of the City in accordance with the present and future needs thereof to the end that the health, safety, morals, order, convenience, prosperity, and general welfare would be best promoted. This the Commission proceeded to do and on January 29, 1934, the City Council adopted Ordinance No. 3-34, which divided the City into seven classes of districts. The Ordinance as adopted contained the classification "Local Business District"; however, the City Council later amended the ordinance to provide for "Local Business District A" and "Local Business District B". The principal difference between the two Districts was that in a Local Business District B, drive-ins, taverns, oil and gas stations were permitted. Use for such purposes was not permitted in a Local Business District A.

The property owned by appellant consists of two tracts of land: one located on the northeast corner of the intersection of Rockdale Road and Grandview Avenue; the other

is located on the northwest corner of the same intersection. Both parcels are now and have always remained vacant and unimproved, except for billboards at the rear of the premises. The 1934 zoning ordinance zoned both of the tracts for single family residence use. At the time of the adoption of the zoning ordinance in 1934, an area south and west of the intersection along Grandview Avenue (approximately 100 feet in width, east and west, and 300 feet in length, north and south) was in use for local business purposes. At the north end of the strip there was a grocery store and filling station. South of the grocery store and filling station there was a residence. South of the residence was a filling station and the only change in the situation in that strip between 1934 and the commencement of this action in February, 1957, was that the filling station had been replaced by a drive-in at which sandwiches, ice cream, etc., were sold. So far as the record shows the only change made in the 1934 zoning ordinance as to that business district along the south side of Grandview Avenue or in the general area was a change which permitted the State Highway Commission to build an addition to its garage.

To the north of the lot owned by the appellant on the northeast corner of the intersection there is a driveway leading to the City park, known as Grandview Park. That park is of substantial area. To the east of that lot is a well built up residential area. To the north of the lot owned by appellant on the northwest corner is a wooded area on which is situated a single family residence. The topography of some of the area immediately north and west of this lot is precipitous and rugged and has never been used for building purposes.

Rockdale Road is one of the main thoroughfares in the southern part of the City. It commences near the southern end of the main business district and proceeds in a

southerly direction through a large area zoned for residence purposes to the City limits. The map which is part of the Zoning Ordinance indicates that the distance between the point Rockdale Road leaves the main business part of the City and the point where it leaves the City limits is about a mile and a half. About half way between those two points Rockdale Road intersects Grandview Avenue. Grandview Avenue commences approximately two miles north and west of the intersection. It then proceeds in a general southerly direction through an area zoned for residence purposes to the intersection. It then proceeds across and beyond the intersection in an easterly direction through an area zoned for residential purposes. Grandview Avenue is described by the Trial Court as a residential street and Rockdale Road, up to the time of the commencement of this action, consisted of a concrete slab which was around twenty feet wide.

The record does not show when appellant became owner of the property in question, but on three occasions, in 1947, 1952, and in 1956, appellant and others, as owners of the property, requested the City of Dubuque to change the zoning classification from residential to Local Business District B classification and on each occasion the request was denied after notice and hearing, the latest denial having occurred in January, 1956. The court studied the several proceedings with care and became fully and accurately informed of all conditions relative to the zoning of the property. Its findings of the evidentiary facts are not complained of. The Court said:

> "In 1929 * * * the City Council provided for a Planning and Zoning Commission. That Commission, among other things, was directed to make comprehensive studies of the present conditions and future growth of the City in the interests of health, safety

and a co-ordinated adjustment and harmonious development of the City. That Commission was also directed to prepare a comprehensive zoning plan for the City. In 1934 the City Council adopted a comprehensive zoning plan for the City. At the time the Council adopted that Ordinance the two strips, heretofore referred to, were in use for businesses generally regarded as local in character. Those two strips together were approximately a block and a half in area. They were situated deep in the heart of an area deemed by the City Council to be desirable for residential use. The City Council * * * zoned that block and a half area as a Local Business District in accord with the use then being made of it. It strictly restricted the limits of that District to that block and a half area. The only changes in that block and a half area between 1934 and the commencement of this action were an increase in the traffic on Rockdale Road, the removal of the motel cabins from the north end of the strip, the addition to the Highway Commission garage, and the converting of a filing station to a drive-in."

"The Planning and Zoning Commission has consistently refused to recommend any extension to that block and a half area for business purposes and the City Council has consistently refused to allow such expansion. The Planning and Zoning Commission and the City Council have not permitted any intrusions for business or industrial purposes into that area zoned for residential purposes in this part of the City. That Commission and the City Council have regarded Grandview Avenue as a natural break on the north against encroachment of business places into an area zoned for residential purposes. The Planning and Zoning Commission has manifested special concern as to the traffic problem at the intersection of Rockdale Road and Grandview Avenue. It is apparent that the Planning and Zoning Commission and the City Council are desirous of preventing the start of what could result in a gradual erosion of a desirable residential area. There is no claim made that the members of the Plan-

ning and Zoning Commission and the City Council in refusing to extend the Local Business District in question north of Grandview Avenue have been motivated by ill will or other improper motives. It is apparent that neither that Commission nor the City Council has showed any favoritism in the matter of preventing business intrusion into this residential area of the City, either generally or particularly."

Early in 1956 the State of Iowa, acting through the Iowa Highway Commission made plans to relocate Highway 51, running through appellant's property, and endeavored to negotiate purchase of the property from appellant on the basis of the value of the property as zoned for residential purposes. Appellant refused to sell on that basis and in March, 1956, condemnation proceedings were commenced to take appellant's property. The jury awarded damages in the amount of $12,000. Appellant has taken an appeal from that award to the District Court of Iowa, Dubuque County, and it is presently awaiting trial in that court.

The only issue tried in the court below, in the present case, was whether appellee denied appellant due process of law by its refusal to rezone appellant's property for Local Business District B uses. The trial court found that the refusal to rezone was proper and legal under the police power granted to the City Council and did not constitute a denial to appellant of due process of law.

Appellant on this appeal contends that the Trial Court erred in failing to find as a fact that the rezoning of appellant's property for business purposes would not depreciate the surrounding property. He argues that where the point at issue is the rezoning of property located on the boundary of two zones, to allow a use which does not constitute a nuisance and for which the property is better suited, then the only equities to be weighed are the financial detriment

to the appellant arising from the existing zoning ordinance as opposed to the financial loss to the adjoining property owners arising from rezoning appellant's property.

[1, 3] The rule contended for by appellant does not appear to be the law of Iowa. The Supreme Court of Iowa in *Anderson* v. *Jester*, 206 Iowa 452, 221 N.W. 354, 357, held:

> "All regulation imposes limitation upon the full use and enjoyment of property and in a sense takes away property rights. Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568. That full use and enjoyment of a plot of ground is prohibited, that the excluded use is the most profitable to which the land can be put, or that the prohibition deprives the owner of profit that would otherwise be derived from such use, or that esthetic considerations incidentally enter into the determination does not invalidate the regulation."

and in *City of Des Moines* v. *Manhattan Oil Company*, 193 Iowa 1096, 1111, 184 N.W. 823, 188 N.W. 921, 23 A.L.R. 1322, that court said:

> "A district may be zoned as residential, and industrial enterprises excluded from it though it is sparsely settled and adapted for industrial uses."

Finally, in the recent case of *Brackett* v. *City of Des Moines*, 246 Iowa 249, 67 N.W.2d 542, 547, wherein the plaintiff testified that his properties would have a market value much greater as commercial than as residential property, the Iowa Court expressly repudiated the contention that market value should be the sole basis for zoning and declared: "This [value] is a circumstance, present in many cases, which although entitled to consideration, is not controlling." Cf. *Geneva Inv. Co.* v. *City of St. Louis*, 8 Cir., 87 F.2d 83, 90; *Euclid, Ohio*, v. *Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016, 1023; *Hada-*

check v. *Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348; Am. Jur., Zoning, Section 140.

Appellant contends that the City acted arbitrarily, discriminatorily, unreasonably and capriciously in its refusal to rezone his property and that the trial court erred in holding that the refusal to rezone was reasonable and proper.

Zoning in municipalities finds its authority under Chapter 414, Code of Iowa 1954, I.C.A., and these statutes have been sustained as a valid exercise of the police power for the purpose of promoting the health, safety, morals and general welfare of the community, city or town. *Keller* v. *City of Council Bluffs*, 246 Iowa 202, 66 N.W.2d 113, 116, 51 A.L.R.2d 251; *Boardman* v. *Davis*, 231 Iowa 1227, 3 N.W.2d 608; *Anderson* v. *Jester*, *supra*, 221 N.W. 357; *City of Des Moines* v. *Manhattan Oil Co.*, *supra*, 184 N.W. 829. The Iowa Court in the Keller case held that "It is within a council's power and authority, however, to decide whether or not the property so [zoned] is similar in character and use to that of surrounding property, and when a sufficient showing has been made to reasonably support its judgment such discretion may not be superceded by the court's different conclusion. There are other factors which may be considered, such as whether the action will increase the burden unjustly on the other surrounding property or be harmful to the health, safety and general welfare of the community, but in those matters again the council's discretion is controlling unless it is clearly shown to be arbitrary and capricious. * * * The burden is upon the plaintiffs * * * to establish that the acts of the council were arbitrary, unreasonable, unjust and out of keeping with the spirit of the zoning statutes." 66 N.W.2d 113, 116-117. Further, the Iowa courts have consistently held that "classification or regulation will not be held arbitrary, or unreason-

able, or discriminatory, unless clearly so." *Anderson* v. *Jester, supra*, 221 N.W. 357; *City of Des Moines* v. *Manhattan Oil Co., supra*, 184 N.W. 829.

The record here shows that the action of the City Council and the Planning and Zoning Commission conforms to the comprehensive and uniform city-wide zoning plan. Evidence was presented and the trial court found that the Planning and Zoning Commission has, since the adoption of the Ordinance, 3-34 in 1934, consistently and without exception refused to recommend any extension of the block and a half area bordering appellant's property for business purposes and they have not permitted any intrusions for business or industrial purposes into that general area zoned for residential purposes. The evidence here established that the City Council and the Planning and Zoning Commission conformed to good city planning in the realm of zoning restrictions. They have regarded Grandview Avenue as a natural break on the north against encroachment of business places into an area zoned for residential purposes, and upon this and other facts, the Council concluded that the public welfare would be promoted by constituting that area, including appellant's property, as a residential area. The trial court, after complete examination and study of all the evidence and testimony presented, found that the action of the City Council in refusing to rezone appellant's property was proper and legal.

[4] The findings of the District Court are presumptively correct and the evidence presented on this appeal does not show that they are clearly erroneous. See *Arcna Company* v. *Minneapolis Gas Company*, 8 Cir., 234 F.2d 451, 453-454.

[5, 6] It is impossible for us to say that the City Council's conclusion in respect to rezoning appellant's prop-

erty was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable or unequal exercise of power is fairly debatable. In such circumstances, the law is well settled that the courts will not substitute their judgment for that of the legislative body charged with the primary duty and responsibility of determining the question. *American Wood Products Co.* v. *City of Minneapolis*, 8 Cir., 35 F.2d 657, 663; *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328, 47 S.Ct. 594, 71 L.Ed. 1074.

In contending that the zoning is discriminatory, appellant points to two strips of land approximately a block and a half in area, on the south side of Grandview Avenue and south of his property which are zoned Local Business District B. However, the record shows that in 1934 when the City Council adopted the comprehensive zoning plan the two strips were in use for business; were regarded as local in character in conformity with the proposed ordinance; and were zoned as they were found.

[7] The mere fact that appellant's property fronts on Grandview Avenue and to a certain depth is more favorably situated for commercial uses and has a greater value as commercial property does not justify the rezoning of the property to Local Business District B, especially in view of the comprehensive zoning plan of the City of Dubuque, which is designed to maintain the area north of Grandview Avenue as a desirable residential area. As this Court stated in *American Wood Products Co.* v. *City of Minneapolis*, *supra*, 35 F.2d at pages 661-662: "Of course the line of demarcation between property to be used for industrial purposes and residence purposes is necessarily in any case somewhat arbitrary, but can it be said that merely because the property on one side of the railroad may be as good for industrial purposes as that on the other

side that failure to draw the line so as to include all the property appropriate for industrial purposes within one area is such an arbitrary action as to render the same violative of the Constitution?"

This brings us to appellant's final contention that the trial court erred in failing to find that the refusal to rezone appellant's property for commercial use was a denial of due process of law under the Fourteenth Amendment to the United States Constitution.

[8] The law is well settled that when constitutional questions are raised all reasonable intendments must be indulged in favor of the validity of the enactments. The prerogative of the courts to declare acts of the legislative body illegal because they transgress upon provisions of the State or Federal Constitution must be exercised with great care and only in compelling cases. *Schwartzman Service* v. *Stahl*, D.C., 60 F.2d 1034, 1037; *Ketcham* v. *State of Iowa*, 8 Cir., 41 F.2d 38, 40-41; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147; *Stoner McCray System* v. *City of Des Moines*, 247 Iowa 1313, 78 N.W.2d 843, 847; *Central States Theatre Corp.* v. *Sar*, 245 Iowa 1254, 66 N.W.2d 450, 453.

[9, 11] A zoning ordinance is for the purpose of promoting the public health, safety, general welfare, and represents an exercise of the police power by a municipality in its governmental capacity. Every zoning regulation affects property already owned by individuals and causes some curtailment of the rights of such owners by restricting prospective uses. Thus it may be said to lay an uncompensated burden upon some property owners. However, this is not regarded as depriving the owner of his property or such use of it as he may desire to make. It is merely a restraint upon the use of it for the protection of the gen-

eral well-being, that is, to prevent harm to the public. In determining the validity of such police regulation the prime consideration must be the general purpose and relationship of the ordinance and not the hardship of an individual case. *Brackett* v. *City of Des Moines*, *supra*, 67 N.W.2d 547; *Boardman* v. *Davis*, *supra*, 3 N.W.2d 610.

[12, 13] While federal courts will not permit the destruction of private property under the pretense of police power, and will not hesitate to condemn the erratic exercise thereof, resulting in depriving parties of constitutional rights they will be equally careful not to interfere with that reserved power of the states properly exercised for the general welfare. *American Wood Products Co.* v. *City of Minneapolis*, *supra*, 35 F.2d at page 663. The evidence presented here does not establish that the action of the City Council was clearly arbitrary, unreasonable, or discriminatory. The fact that the zoning left the two corners of the intersection of Grandview Avenue and Rockdale Road for local business and the other two residential is not controlling. Grandview Avenue is a wide street and may well afford an appropriate and proper dividing medium for zoning purposes. The City Council, in determining and establishing this and other zones, acted within the scope of the police power as authorized by the statutes of the State of Iowa and this Court will not substitute its judgment as to the wisdom or propriety of such action, for that of the City Council. We think there was substantial evidence here to support the legislative classification of appellant's property as residential and that the legislative acts of the City Council cannot, therefore, properly be considered as confiscatory in their application to the property in question.

Finding no error, the decree of the trial court is affirmed.

APPENDIX C.

(Judgment.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

No. 15,868.

September Term, 1957.
Thursday, May 8th, 1958.

George Vincent McMahon, Appellant,

vs.

City of Dubuque, Iowa.

Appeal from the United States District Court for the Northern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Northern District of Iowa, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

May 8th, 1958.

APPENDIX D.

Plaintiff's Exhibit 9.
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Chapter XVIII.
Zoning and Platting

Ordinance No. 26-29.

An Ordinance Providing for the Appointment of a City Planning and Zoning Commission and Defining Its Powers and Duties.

Be it Ordained by the City Council of the City of Dubuque:

Planning And Zoning Commission. Section 1. That there be and there is hereby created a city planning and zoning commission, the members of which shall consist of seven citizens of the City of Dubuque who shall be qualified by knowledge and experience to act in matters pertaining to the development of city planning and zoning, none of whom shall hold any elective position in said City. Such members shall be appointed by the City Council.

Tenure Of Office. Section 2. The term of office of said members shall be five (5) years, except that the members first named shall hold office for such terms, not exceeding five (5) years, that the terms of not more than one-third of the members will expire in any one year. Vacancies occurring on the commission caused by resignation or otherwise, shall be filled by the Council for the unexpired term. All members of such commission shall serve without compensation except their actual expenses which shall be subject to the approval of the Council.

Organization. Section 3. Such commission shall choose annually, at its first regular meeting, one of its members to act as chairman; and another of its members as vice-chairman, who shall perform all of the duties of the chairman during his absence or disability. The commission shall adopt such rules and regulations governing its organization and procedure as may be deemed necessary, and it shall make an annual report to the City Council on or before the 1st day of March in each year, such report to contain its proceedings with a full statement of its receipts, disbursements and the progress of its work for the preceding fiscal year. It shall be empowered to appoint and employ such assistants as may be necessary and prescribe and define their duties and fix their compensation.

Appropriation. Section 4. The Council shall annually appropriate a sum of money from the general funds for the payment of the expense of such commission. The commission shall have full, complete and exclusive authority to expend for and on behalf of such City all sums of money so appropriated. Gifts, donations, or payments which are received by such City for city planning and zoning purposes shall be placed in such fund, to be used by the commission in a manner appropriate for its purposes. Said commission shall have no power to contract debts beyond the amount of its incomes for the current year.

Powers. Section 5. Said commission shall have and possess the following powers, and such other powers as may be incidental to the successful carrying out of the powers vested in it herein or such as may be expressly conferred upon it by law:

1. To make such surveys, studies, maps, plans or plats of the whole or any portion of the City and of any land outside thereof, which in the opinion of such commission bears

relation to a comprehensive plan, and shall submit such plan to the Council with its studies and recommendations and it may publish the same.

2. To make recommendations for the location or erection of statutary, memorial or work of art in public places; public buildings, bridges, viaducts, street fixtures, public structures or appurtenances and the sites therefor.

3. To make recommendations upon plans, plats, or replats of subdivisions or resubdivisions in such City which show streets, alleys or other portions of the same intended to be dedicated for public use.

4. To make recommendations for street, park, parkway, boulevard, traffic way or other public improvements.

5. To carry on comprehensive studies of present conditions and the future growth of such City in order to guide and accomplish a co-ordinated, adjusted and harmonious development of such City in accordance with the present and future needs thereof to the end that the health, safety, morals, order, convenience, prosperity and general welfare may be best promoted.

6. To conduct public hearing upon the adoption of such comprehensive plan or any amendment thereto.

7. To prepare a comprehensive plan regarding the height, number of stories and size of buildings and other structures; the percentage of ground that may be occupied; the size of yards, courts and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes and to this end shall prepare a preliminary report and hold public hearings thereon and after such hearings have been held, to submit its final report and recommendations to the City Council.

8. To recommend to the City Council, from time to time, as conditions require, amendments, supplements, changes or modifications in the comprehensive plan prepared by it.

9. To do all things necessary or advisable in order to carry out the intent and purpose of this ordinance and all other ordinances relating to the State of Iowa as they now exist or as the same may be hereafter amended or supplemented.

Passed, adopted and approved upon final reading this 29th day of March, 1929.

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Ordinance No. 3-34.

An Ordinance to Provide for the Comprehensive Zoning of the City of Dubuque and to Regulate and Restrict the Location and Use of Buildings, Structures, and Land for Trade, Industry, Residence or Other Purposes; to Regulate and Restrict the Height of Buildings Hereafter Erected or Altered; to Regulate and Determine the Areas of Yards and Other Open Spaces about Buildings; to Regulate and Determine the Density of Use of Land and Lot Areas and for that Purpose to Divide the City into Districts; to Provide for a Board of Adjustment and the Orderly Enforcement of the Regulations Hereof; to Provide Penalties for the Violation of the Provisions Hereof; Repealing All Ordinances or Parts of Ordinances in Conflict Herewith; and Designating this Ordinance as "The Zoning Ordinance of the City of Dubuque."

Whereas, the City Council of the City of Dubuque Deems it Necessary to Provide for the Zoning or Districting of Said City in Order to Lessen Congestion in the Streets; to Secure Greater Safety and Protection from Fire, Panic and Other Dangers; to Promote

the Public Health, Morals, and General Welfare; to Provide Adequate Light and Air; to Prevent the Overcrowding of Land; to Avoid Undue Concentration of Population; to Facilitate the Adequate Provisions of Transportation, Water, Sewerage, Schools, Parks and other Public Requirements; to Conserve the Value of Lands and Buildings and Encourage the Most Appropriate Use of Land Throughout the City in Accordance with a Comprehensive Plan;

Be it, Therefore, Ordained by the City Council of the City of Dubuque:

Article I. Districts.

Classification Of Districts. Section 1. This ordinance shall be known as "The Zoning Ordinance of the City of Dubuque" and said City is hereby divided into seven classes of districts, to-wit:

a. Single family residence districts.

b. Two family residence districts.

c. Multiple residence districts.

d. Local business districts.

e. Business districts.

f. Light industrial districts.

g. Heavy industrial districts.

Boundaries Of Districts. Section 2. The boundaries of said districts are shown on a map entitled "Zoning Plan, City of Dubuque, Iowa," dated January 29, 1934, which map is hereto attached and made a part hereof and all notations references and information shown thereon shall be as much a part of this ordinance as if the same were fully incorporated herein.

Article II. Single Family Residence District.

Use Regulations. Section 1. No building or premises shall be used and no building or structure shall be erected or altered to be used in whole or in part, unless otherwise provided for in this ordinance, except for the following purposes:

a. Single family dwelling.

b. Educational, religious or philanthropic use, excluding business school and college or correctional institutions.

c. Public library, public museum and other public buildings and municipal structures including water supply reservoir or standpipe.

d. Club, lodge, or community center building, except where the principal activity of which is a service customarily carried on as a business or has more than five sleeping rooms.

e. Public parks, playgrounds, and golf links of over 20 acres.

f. Farm, garden, nursery or greenhouse.

g. Railroad and railway rights-of-way and passenger stations, and bus passenger stations.

h. Telephone exchanges (provided the plans of the building and use of the property are approved by the Planning and Zoning Commission).

i. Professional office or studio of a physician, surgeon, doctor, dentist, architect, musician, lawyer or similar profession, provided that the office or studio is located in a dwelling used as such and further provided that no goods are publicly displayed on the premises, and that no sign or

advertisements are shown other than the name and profession of the person using the office or studio, and such sign or name plate shall not exceed one (1) square foot in area.

j. Accessory use on the same lot with and customary incident to any of the above permitted uses, including a private garage for not more than three (3) motor vehicles.

k. Signs. In addition to the sign or name plate (see item (i)) the following signs may be erected in this district; not more than two temporary signs, neither of which shall exceed twelve (12) square feet in area pertaining to the construction, lease, rent, or sale of a building or premises, and a name plate or bulletin board not exceeding twelve (12) square feet in area at the entrance to a church or similar institution.

1. Hospitals, sanitariums, and garages for more than three (3) motor vehicles, or a private garage on a separate lot, providing a petition therefor, accompanied by the written consent of the owners of seventy-five (75) per cent of the area of all real estate within three hundred (300) feet of any part of the premises upon which such proposed structure is to be established is filed with the Board of Adjustment and approved by it.

m. Boarders or roomers. In a dwelling occupied as a private residence, one or more rooms may be rented or table board furnished up to and including four (4) rooms or eight (8) adult guests.

Height Regulations. Section 2. No building shall be erected or altered to exceed in height thirty-five (35) feet or two and one-half (2½) stories, unless it sets back from each street and lot line, in addition to the yard requirements, one (1) foot for each foot of excess height. No

building shall exceed in height the width of the widest street upon which the lot abuts. Unoccupied towers, spires and domes are excepted.

Area Regulations. Section 3. No building shall be erected or altered except in conformance with the following provisions:

a. Front Yards. A front yard having a mean depth of not less than twenty-five (25) feet is required on every lot, excepting that in blocks where there are existing buildings at the time of the passage of this ordinance, then a front yard for any new, altered, or reconstructed building, may be varied by the Board of Adjustment upon petition or appeal, as hereinafter provided, in accordance with existing front yards, but in no case shall a front yard be required to exceed fifty (50) feet in depth.

Nothing in this section shall justify the violation of any existing deed, or contract prescribing a building line although such would create a front yard or equivalent open space of a greater mean depth than specified in this section.

b. Side Yards. On every lot, side yards are required, each with a minimum width of not less than six (6) feet and aggregating a total of not less than twenty-five (25) per cent of the width of the lot. On a corner lot, the house side yard adjacent to a side street shall have a minimum width of not less than ten (10) feet.

c. Rear Yards. A rear yard having a mean depth of not less than twenty-five (25) per cent of the total depth of the lot is required.

d. Courts. All courts shall conform to the requirements of the Housing Law, State of Iowa.

e. Lot Area Per Family. No dwelling shall be erected or placed on a lot containing less than six thousand (6,000)

square feet or a width less than fifty (50) feet.

Nothing in the area regulations of this ordinance relating to lot area per family shall be held to prohibit the erection of a one-family dwelling upon a lot, the area of which is less than that prescribed as the minimum lot area per family, provided such lot was held under separate ownership from the adjacent lots, and a recorded plat of lots or subdivision of property shows such lot to be separate and distinct at the time of the passage of this ordinance. Vacant adjacent lots held by the same owner at time of the passage of this ordinance shall be replatted to provide the required lot area per family before any building is erected or placed thereon.

f. See Article IX (h). Window Area Requirements.

Accessory Uses. Section 4.

a. Rear Yard Area Occupied by Accessory Uses. Accessory buildings may occupy not to exceed forty (40) per cent of the area of the rear yard.

b. Private Garages. A private garage not exceeding fifteen (15) feet in height may provide storage for not more than three (3) motor vehicles, but shall not exceed two hundred and forty (240) sq. ft. of area per vehicle. Not more than one commercial motor vehicle may be stored therein. Storage space for not more than two (2) motor vehicles may be rented to others than occupants of the premises. No business, occupation or service connected in any way with motor vehicles shall be permitted.

c. Location of Accessory Buildings. No part of any accessory building shall be nearer than fifty (50) feet to

any front street line, or nearer than three (3) feet to any interior side or rear lot line, except that a private garage may be incorporated in a dwelling, in which case the house side yard clearance shall prevail. In the case of a corner lot any separate accessory building shall not be nearer to the side street line than fifteen (15) feet.

No accessory building shall be located within ten (10) feet of the rear of a one-story dwelling and two (2) feet additional for each story of the dwelling above the first.

d. Barns and Stables. Provision may be made for the shelter of private horses, and for such vehicles as may be appropriate for transportation use in connection therewith. Two (2) horses shall be deemed the equivalent of one (1) motor vehicle, in determining the permitted number. No barn or stable shall be erected or used on a lot closer than sixty (60) feet to the dwelling on said lot, or closer than seventy-five (75) feet to a dwelling on any adjacent lot.

The keeping of sheep, rabbits, goats, or cattle is prohibited except on premises containing over one acre, and except within an enclosure distant at least fifty (50) feet from any side lot line or any street line. Poultry shall not be kept other than within an enclosure distant at least ten (10) feet from any side lot line and at least fifty (50) feet from any street line or dwelling.

Undeveloped Area. Section 5. The usual farm buildings may be erected for farm purposes in outlying undeveloped areas except that no building shall be erected on an approved street location. Temporary non-conforming structures may be erected in such undeveloped areas for not more than two (2) years, but this period may be extended by the Board of Adjustment upon its own motion or upon petition or appeal or upon the recommendation of the Planning and Zoning Commission.

* * * * * * *

(Articles III and IV omitted.)

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Article V. Local Business District.

Use Regulations. Section 1. No building or premises shall be used and no building or structure shall be erected or altered to be used in whole or in part, unless otherwise provided for in this ordinance, except for the following purposes:

a. Uses permitted in a Multiple Residence District.

b. Retail store.

c. Personal service establishment.

d. Moving picture theatre, dance hall, amusement park.

e. Oil and gasoline service station (subject to Article IX (d)).

f. Public garage for the sale, servicing or repair of motor cars (subject to Article IX (d)).

g. Funeral home or mortuary.

h. Sign boards and electric signs, indicating the name and character of business transacted on the premises, attached to the building or structure, but not suspended or projected more than six feet therefrom.

i. Billboards, providing the same are designed and constructed according to the Building Code, and providing further that they shall not be located closer than twenty-five (25) feet from the street or alley line, and be not over fifteen (15) feet in height and subject to approval by the Board of Adjustment after a public hearing.

Height Regulations. Section 2. No building shall be erected or altered to exceed in height fifty (50) feet or four

(4) stories. Unoccupied towers, spires and domes are excepted.

Area Regulations. Section 3. No building shall be erected or altered except in conformance with the following provisions:

a. Front Yard. A front yard having a mean depth of not less than fifteen (15) feet is required on every lot. When a lot is used in whole or in part for business purposes there shall be provided next to the building front a public sidewalk not less than five (5) feet in width and connected with adjacent sidewalks, and a parking space for motor vehicles between such sidewalk and the street line. This parking space shall be made directly accessible from the street for its entire length.

b. Side Yards. On every lot used exclusively for residential purposes side yards are required each with a minimum width of four (4) feet and such side yards shall be increased in width by one (1) foot for each additional story above the first. On a corner lot used for business purposes the side yard adjacent to the side street shall be a minimum of four (4) feet in width.

c. Rear Yards. A rear yard is required on every lot which shall be of a mean depth of not less than ten (10) feet and shall be increased by two (2) feet for each additional story above the first.

d. Courts. All courts in residential structures shall conform to the requirements of the Housing Law, State of Iowa. Courts for other than residential structures shall be governed by the Building Code of the City of Dubuque.

e. Lot Area Per Family. No dwelling shall be erected or placed on a lot containing less than the following minimum lot area per family:

One family dwelling—five thousand (5,000) square feet.

Two family dwelling—one thousand two hundred fifty (1,250) square feet per family.

Apartment house—one thousand two hundred fifty (1,250) square feet per family.

Nothing in the area regulations of this ordinance relating to lot area per family shall be held to prohibit the erection of a one family dwelling upon a lot, the area of which is

less than that prescribed as the minimum lot area per family, provided such lot was held under separate ownership from the adjacent lots, and a recorded plat of lots or subdivision of property shows such lot to be separate and distinct at the time of the passage of this ordinance. Adjacent lots held by the same owner at time of passage of this ordinance shall be replatted to provide the required lot area per family before any building is erected or placed thereon.

Accessory Uses. Section 4.

a. Rear Yard Area Occupiable by Accessory Uses. Accessory buildings may occupy not to exceed forty (40) per cent of the area of the rear yard.

b. Private Garages. A private garage not exceeding fifteen (15) feet in height may provide storage for not more than four (4) motor vehicles.

c. Location of Accessory Buildings. No part of any accessory building shall be nearer than thirty (30) feet to any front street line, or nearer than three (3) feet to any side or rear lot line except that a private garage may be incorporated in a building in which case the building side

yard clearance shall prevail. In the case of a corner lot any separate accessory building shall not be nearer to the side street line than ten (10) feet.

* * * * * * *

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Plaintiff's Exhibit 10

Ordinance No. 25-55

An Ordinance amending Ordinance No. 3-34 known as the Zoning Ordinance by repealing Article V there VB; and, amending Article X thereof and enacting new Article VA and by adding definitions of "Drive-In" and "Drive-In Restaurants."

Be it Ordained by the City Council of the City of Dubuque Iowa:

Section 1. That Article V of Ordinance No. 3-34 known as the "Zoning Ordinance" be and the same is hereby repealed.

Section 2. That Ordinance No. 3-34 known as the Zoning Ordinance be and the same is hereby amended by adding a new Article VA thereto as follows:

Article VA Local Business

District A

Section 1. Use Regulations.

No building or premises shall be used and no building or structure shall be erected or altered to be used in whole or in part, unless otherwise provided for in this ordinance, except for the following purposes:

(a) Uses permitted in a Multiple Residence District.

(b) Retail store except those retail stores engaged in a business hereinafter specifically mentioned in a lower Zoning Classification.

(c) Professional office building for physicians, surgeons, dentists, architects, attorneys or similar professions.

(d) Bank or financial institutions.

(e) Storage garage.

(f) Personal Service Establishments.

(g) Sign Boards and electric signs, indicating the name and character of business transacted or profession practiced on the premises, attached to the building or structure, but not suspended or projected more than six (6) feet therefrom, or projecting more than eight (8) feet above the roof.

Section 2. Height Regulations.

No building shall be erected or altered to exceed in height thirty (30) feet. Unoccupied towers, spires and domes are excepted.

Section 3. Area Regulations.

No building shall be erected or altered except in conformance with the following provisions:

(a) Front Yard. A front yard having a mean depth of

not less than fifteen (15) feet is required on every lot. When a lot is used in whole or in part for business purposes there shall be provided next to the building front a public sidewalk not less than five (5) feet in width and connected with adjacent sidewalks, and a parking space for motor vehicles between such sidewalk and the street line. This parking space shall be made directly accessible from the street for its entire length.

(b) Side Yards. On every lot used exclusively for residential purposes side yards are required each with a minimum width of four (4) feet and such side yards shall be increased in width by one (1) foot for each additional story above the first. On a corner lot used for business purposes the side yard adjacent to the side street shall be a minimum of four (4) feet in width.

(c) Rear Yards. A rear yard is required on every lot which shall be of a mean depth of not less than ten (10) feet and shall be increased by two (2) feet for each additional story above the first.

(d) Courts. All courts in residential structures shall conform to the requirements of the Housing Law, State of Iowa. Courts for other than residential structures shall be governed by the Building Code of the City of Dubuque.

(e) Lot Area Per Family. No dwelling shall be erected or placed on a lot containing less than the following minimum lot area per family:

One family dwelling—five thousand (5,000) square feet.

Two family dwelling—one thousand two hundred and fifty (1,250) square feet per family.

Apartment house—one thousand two hundred and fifty (1,250) square feet per family.

Nothing in the area regulations of this ordinance relating to lot area per family shall be held to prohibit the erection of a one family dwelling upon a lot, the area of which is less than that prescribed as the minimum lot area per family, provided such lot was held under separate ownership from the adjacent lots and a record plat of lots or subdivision of property shows such lot to be separate and distinct at the time of the passage of this ordinance. Adjacent

lots held by the same owner at time of passage of this ordinance shall be replatted to provide the required lot area per family before any building is erected or placed thereon.

Section 4. Accessory Uses.

(a) Rear Yard Area Occupiable by Accessory Uses. Accessory buildings may occupy not to exceed forty (40) per cent of the area of the rear yard.

(b) Private Garages. A Private garage not exceeding fifteen (15) feet in height may provide storage for not more than four (4) motor vehicles.

(c) Location of Accessory Buildings. No part of any accessory building shall be nearer than thirty (30) feet to any front street line or nearer than three (3) feet to any side or rear lot line, except that a private garage may be incorporated in a building in which case the building side yard clearance shall prevail. In the case of a corner lot any separate accessory building shall not be nearer to the side street line than ten (10) feet.

Section 3. That Ordinance No. 3-34 known as the Zoning Ordinance Be and the same is hereby amended by adding a new Article VB thereto as follows:

Article VB Local Business

District B

Section 1. Use Regulations.

No building or premises shall be used and no building or structure shall be erected or altered to be used in whole or in part, unless otherwise provided for in this ordinance, except for the following purposes:

(a) Uses permitted in a Local Business District A.

(b) Office building.

(c) Restaurant, Drive-in, Drive-in restaurant, cafe, cafeteria, tavern.

(d) Moving picture theater, dance school.

(e) Oil and gasoline station (subject to Article IX (d)).

(f) Public garage for the sale, servicing or repair of motor vehicles (subject to Article IX (d)).

(g) Funeral home or mortuary.

(h) Trailer Parts provided for the same are designed, constructed and maintained in accordance with Article IX hereof.

(i) Trailer Sales Lots. Auto Sales Lots.

Section 2. Height Regulations.

No building shall be erected or altered to exceed in height forty (40) feet unless it sets back from each street and lot line, in addition to the yard requirements, one (1) foot for each one foot of excess height. No building shall exceed in height the width of the widest street upon which the lot abuts. Unoccupied towers, spires and domes are excepted.

Section 3. Area Regulations.

The area regulations for Local Business District A shall apply.

Section 4. Accessory Uses.

Accessory uses permitted in Local Business District A shall apply.

Section 4. That Article X of Ordinance No. 3-34 known as the Zoning Ordinance be and the same is hereby amended by adding thereto the following definitions:

Drive-In. The term Drive-In, where used in this Ordinance, shall mean, a business catering to the motoring public, whether also serving pedestrians or not, which is engaged in the retail sale of goods or services and provides curb or window-counter service.

Drive-In Restaurant. The term Drive-In Restaurant, where used in this ordinance, shall mean an establishment engaged in the sale of food or beverages which, as a part of its regular business, provides service to patrons seated in motor vehicles on the premises or in the street adjacent thereto.

Adopted 6/6/55

Published 6/13/55

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 231

GEORGE VINCENT McMAHON,
Petitioner,

vs.

CITY OF DUBUQUE, IOWA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRICE W. RHYNE,
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E. L. MENDENHALL, INC., 108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The City of Dubuque, Iowa, opposes the Petition of George Vincent McMahon for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on May 8, 1958.

REASONS FOR OPPOSING PETITION FOR WRIT OF CERTIORARI.

The Petition fails to set forth any special or important reason therefor. This case does not fall within any of the reasons enumerated in Rule 19b of the above entitled Court.

The subject matter of the case is but a routine question of zoning and stands or falls upon the specific question of whether or not the discretionary power of the City Council of the City of Dubuque has been abused under the facts in the case. The facts of this case are peculiar to itself and any rule enunciated by the Supreme Court of the United States would only be cumulative so far as the Law of zoning is concerned, as the rule would only apply to the identical set of facts at the same time and place.

Rather, there are peculiar and compelling reasons why this Writ should be denied. As shown in Petitioner's Statement of the Case, the land under consideration has been acquired by the State of Iowa, through condemnation proceedings and Petitioner's only concern is with the amount of damages that a jury may award him for the value of his land. The only way that this zoning matter is involved at all is the manner in which it bears upon the testimony of the valuation witnesses. This testimony is in no way binding upon the jury and it may award petitioner such damages as it finds basis for in the evidence. Consequently, it is respondent's position that any determination by this Court in the matter presented by Petitioner would have such an indirect bearing upon the true issue that there would not be a special and important reason for granting of the Writ, even if Petitioner had established in the lower Courts that he had a good case.

On Page 12, lines 2, 3, 4, and 5 of his Petition, Petitioner states, referring to the Planning and Zoning Commission of the City of Dubuque:

> "Patently, this is a deliberate, unconscionable and obvious perversion of the zoning ordinances, and even on its face is baldly arbitrary, unreasonable and discriminatory."

The Planning and Zoning Commission is a group of public spirited citizens, acting without compensation. The District Court found (R. page 43) that,

> "There is no claim made that the members of the Planning and Zoning Commission and City Council, in refusing to extend the Local Business District in question north of Grandview Avenue have been motivated by ill will or other improper motives."

Respondent submits that if these public spirited citizens are to be subjected to the abusive attack against their character, alleging them to be men without conscience, arbitrary, and perverters of the truth, as set forth in the above quotation from the Petition for the Writ, such attack should have been made at the inception so as to afford them the opportunity to be heard in defense of their personal characters and reputation. Respondent further submits that such a reckless and unjustified attack upon the character of these men constitutes sufficient grounds in itself for the dismissal of the Petition.

Respectfully submitted,

CITY OF DUBUQUE, IOWA,
Respondent,
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